



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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Ref: 8EPR-EP

September 20, 2004

Mr. Walter L. Baker, Acting Director
Division of Water Quality
Department of Environmental Quality
2800 North 1460 West
P.O. Box 144870
Salt Lake City, Utah 84114-4870

Re: Clean Water Act Section 303(d)
Total Maximum Daily Load (TMDL)
Waterbody List

Dear Mr. Baker:

Thank you for your submittal of Utah's year 2004 Clean Water Act Section 303(d) waterbody list dated March 30, 2004 and the amendment dated August 30, 2004. EPA has conducted a complete review of this waterbody list and supporting documentation and information. Based on this review, EPA has determined that Utah's 2004 list of water quality limited segments (WQLSs) still requiring TMDLs meets the requirements of Section 303(d) of the Clean Water Act ("CWA" or "the Act") and EPA's implementing regulations. Therefore, by this order, EPA hereby APPROVES Utah's Section 303(d) list. Please see the enclosure for a description of the statutory and regulatory requirements and a summary of EPA's review of Utah's compliance with each requirement.

EPA's approval of Utah's Section 303(d) list extends to all waterbodies on the list with the exception of those waters that are within Indian Country, as defined in 18 U.S.C. Section 1151. EPA is taking no action to approve or disapprove the State's list with respect to those waters at this time. EPA, or eligible Indian Tribes, as appropriate, will retain responsibilities under Section 303(d) for those waters.

The public participation process sponsored by Utah DEQ included publishing display ads in newspapers across the State requesting public input in developing the draft list and requesting water quality data, official public notices on the list availability, use of the Utah DEQ website, and a mailing to many entities asking for both comments and additional data or information on waters. We commend the State for its thorough public participation process.



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We wish to inform you that our office has received concurrence from the U.S. Fish and Wildlife Service dated July 26, 2004, regarding our biological evaluations of the approval of the State's year 2004 waterbody list. Our biological evaluation that addressed our approval was submitted to the Service in accordance with Section 7 of the Endangered Species Act. In our evaluation, we assessed the effects of our approval on the threatened, endangered, proposed, and candidate species throughout the State. Our conclusion was that our approval of the State's list would not likely have an adverse effect on the species of concern. Any effect of the list approval was seen as either insignificant or beneficial to the species.

Under current regulations, the next Section 303(d) list is required to be submitted on April 1, 2004. Although current regulations require lists to be submitted every 2 years, in April of even years, States may submit Section 303(d) lists more frequently as they deem necessary. All additions, deletions and modifications to the list will require EPA approval.

Again, thank you for the efforts related to the good job of developing the §303(d) TMDL waterbody list for the 2004-2006 biennium. If you have questions on any of the above information, feel free to give me, or Kathryn Hernandez (303-312-6101) of my staff, a call.

Sincerely,

Original Signed by Max H. Dodson

Max H. Dodson
Assistant Regional Administrator
Ecosystems Protection and
Remediation

Enclosure

Review of Utah's 2004 Section 303(d) Waterbody List

*Attachment to letter from Max H. Dodson, Assistant Regional Administrator,
Office of Ecosystems Protection and Remediation, US EPA, Region VIII to Don Ostler, Director, Utah Department of
Environmental Quality*

Date of Transmittal Letter from State: March 30, 2004
Date of Receipt by EPA: April 1, 2004

I. Introduction

The purpose of this review document is to describe the rationale for EPA's approval of Utah's 2004 §303(d) waterbody list. The following sections identify those key elements to be included in the list submittal based on the Clean Water Act (“Act” or “CWA”) and EPA regulations. See 40 CFR 130.7. EPA reviewed the methodology used by the State in developing the §303(d) list and the State's description of the data and information it considered. EPA's review of Utah's §303(d) list is based on EPA's analysis of whether the State reasonably considered existing and readily available water quality-related data and information and reasonably identified waters required to be listed.

Utah's 2004 list is considered an update of the State's 2002 list, and as such, the §303(d) list EPA is approving today is comprised of 147 waterbodies, compared with 173 waterbodies included on the 2002 list. States may add and take waters off their §303(d) lists based on several factors. Utah delisted 34 waterbodies from its year 2002 list and added 8 waters in 2004. In anticipation of a four year listing cycle, Utah elected to include on its 2004 list many waterbodies where TMDLs are likely to be necessary due to renewal of Surface Water Discharge permits during the next four years.

II. Statutory and Regulatory Background

A. Identification of Water Quality Limited Segments (WQLSs) for Inclusion on Section 303(d) List

Section 303(d)(1) of the Act directs States to identify those waters within its jurisdiction for which effluent limitations required by Section 301(b)(1)(A) and (B) are not stringent enough to implement any applicable water quality standard, and to establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters. The Section 303(d) listing requirement applies to waters impaired by point and/or nonpoint sources, pursuant to EPA's long-standing interpretation of §303(d).

EPA regulations provide that States do not need to list waters where the following controls are adequate to implement applicable standards: (1) technology-based effluent limitations required by the Act, (2) more stringent effluent limitations required by State or local authority, and (3) other pollution control requirements required by State, local, or federal authority. (See 40CFR 130.7(b)(1))

B. Consideration of Existing and Readily Available Water Quality-Related Data and Information

In developing Section 303(d) lists, States are required to assemble and evaluate all existing and readily available water quality-related data and information, including, at a minimum, consideration of existing and readily available data and information about the following categories of waters: (1) waters identified as partially meeting or not meeting designated uses, or as threatened, in the State's most recent Section 305(b) report; (2) waters for which dilution calculations or predictive modeling indicate nonattainment of applicable standards; (3) waters for which water quality problems have been reported by governmental agencies, members of the public, or academic institutions; and (4) waters identified as impaired or threatened in any Section 319 nonpoint assessment submitted to EPA. (See 40 CFR 130.7(b)(5)) In addition to these minimum categories, States are required to consider any other data and information that is existing and readily available. EPA's 1991 Guidance for Water Quality-Based Decisions describes categories of water quality-related data and information that may be existing and readily available. (See Guidance for Water Quality-Based Decisions: The TMDL Process, EPA Office of Water, 1991, Appendix C ("EPA's 1991 Guidance")) While States are required to evaluate all existing and readily available water quality-related data and information, States may decide to rely or not rely on particular data or information in determining whether to list particular waters.

In addition to requiring States to assemble and evaluate all existing and readily available water quality-related data and information, EPA regulations at 40 CFR 130.7(b)(6) require States to include, as part of their submissions to EPA, documentation to support decisions to rely or not rely on particular data and information and decisions to list or not list waters. Such documentation needs to include, at a minimum, the following information: (1) a description of the methodology used to develop the list; (2) a description of the data and information used to identify waters; and (3) any other reasonable information requested by the Region.

C. Priority Ranking

EPA regulations also codify and interpret the requirement in §303(d)(1)(A) of the Act that States establish a priority ranking for listed waters. The regulations at 40 CFR 130.7(b)(4) require States to prioritize waters on their §303(d) lists for TMDL development, and also to identify those Water Quality Limited Segment (WQLSs) targeted for Total Maximum Daily Load (TMDL) development in the next two years. In prioritizing and targeting waters, States must, at a minimum, take into account the severity of the pollution and the uses to be made of such waters. (See §303(d)(1)(A)) As long as these factors are taken into account, the Act provides

that States establish priorities. States may consider other factors relevant to prioritizing waters for TMDL development, including immediate programmatic needs such as wasteload allocations for permits, vulnerability of particular waters as aquatic habitats, recreational, economic, and aesthetic importance of particular waters, degree of public interest and support, and State or national policies and priorities. (See 57 FR 33040, 33045 (July 24, 1992), and EPA's 1991 Guidance.)

III. Analysis of Utah's Submission

A. Background

EPA has reviewed the State's submission, and has concluded that the State developed its §303(d) list in compliance with §303(d) of the Act and 40 CFR 130.7. EPA's review is based on its analysis of whether the State reasonably considered existing and readily available water quality-related data and information and reasonably identified waters required to be listed.

The state's list was submitted to EPA enclosed with correspondence dated March 30, 2004 from Don Ostler, Director of the Utah Department of Environmental Quality, in a document entitled "*Utah's 2004 §303(d) List of Waters.*" The amendment to the state's list was dated August 30, 2004 from Walter Baker, Acting Director of the Utah Division of Water Quality. Utah's 2004 §303(d) waterbody list submitted to EPA consisted of the following items:

- a discussion of the State's methodology for developing the §303(d) List including data requirements; designated use support criteria and water quality standards;
- a summary of the data and information used to prepare the §303(d) List;
- a summary of the procedures used by the State to involve the public;
- a discussion of the State's priority ranking for waterbodies on the list;
- the proposed schedule for completion of the 2004-2006 cycle TMDLs
- the year 2004 §303(d) waterbody list;
- a summary table

After reviewing Utah's year 2004 list, EPA has concluded that the waters added to the list were based on data and information consistent with the State's listing methodology. Further, EPA has concluded that waters taken off the list were done so because TMDLs were developed or the State correctly determined that TMDLs were no longer needed.

The 2004 §303(d) waters are found in the following tables in the State's submittal:

- Tables 8- Category 5A, Table 9 - Category 5A and Table 12 - Category 5C - Listing of TMDL Waters.

These tables include the following information for each waterbody: the name of the major hydrologic basin for the waterbody, the waterbody name, the waterbody location, the map identifier, the beneficial use that is threatened or impaired (only tables 8 and 9), the pollutant

parameter(s) of concern, the priority for developing TMDLs., and whether the waterbody is targeted for TMDL development over the next two years.

Utah properly listed waters with nonpoint sources causing or expected to cause impairment, consistent with §303(d) and EPA guidance. Section 303(d) lists are to include all water quality-limited segments (WQLSs) still needing TMDLs, regardless of whether the source of the impairment is a point and/or nonpoint source. EPA's long-standing interpretation is that §303(d) applies to waters impacted by point and/or nonpoint sources. This interpretation has been described in EPA guidance. (See EPA's April 1991 Guidance and National Clarifying Guidance for 1998 Section 303(d) Lists, Aug. 27, 1997) In *Pronsolino v. Marcus*, the District Court for the Northern District of California held that section 303(d) of the Clean Water Act (CWA) authorizes EPA to identify and establish total maximum daily loads (TMDLs) for waters impaired by nonpoint sources. *Pronsolino et al. v. Marcus et al.*, 91 F.Supp.2d 1337, 1347 (N.D.Ca. 2000). In addition, this interpretation of §303(d) is described in detail in a May 23, 1997, memorandum from Geoffrey Grubbs, Director of the Assessment and Watershed Protection Division, EPA Office of Water, to the FACA Workgroup on §303(d) Listing Criteria¹. (See Memorandum from Geoffrey H. Grubbs, Director, Assessment and Watershed Protection Division, to FACA Workgroup on §303(d) Listing Criteria, "Nonpoint Sources and Section 303(d) Listing Requirements", May 23, 1997) (See also Memorandum from Robert Perciasepe, Assistant Administrator, Office of Water, to Regional Administrators and Regional Water Division Directors, "New Policies for Establishing and Implementing TMDLs," August 8, 1997)

B. Identification of Waters and Consideration of Existing and Readily Available Water Quality-Related Data and Information

EPA has reviewed Utah's description of the data and information it considered for identifying waters on the §303(d) list. EPA concludes that the State properly assembled and evaluated all existing and readily available data and information, including data and information relating to the categories of waters specified in 40 CFR 130.7(b)(5). In particular, the State relied on information from the year 2004 §305(b) report, assessments performed under the 319 non-point source program, as well as data and information obtained through an extensive process to solicit information from state, federal and citizen sources. The State's evaluation of data and information in each of these categories is described below.

■ *Waters identified by the state in its most recent section 305(b) report as "partially meeting" or "not meeting" designated uses or as "threatened" (§130.7(b)(5)(i)).*

Utah's water quality assessments conducted as part of the Section 305(b) report formed the basis for the State's TMDL List. As part of this assessment, the State uses

¹ EPA convened a Federal Advisory Committee Act (FACA) Committee in November 1996. The report of this FACA committee is found in EPA document EPA 100-R-98-006 (July 1998).

established ambient water quality sampling, special intensive water quality surveys, intensive fish surveys, surface water discharge permits, and nonpoint source projects to collect data and to assess the beneficial use support of its rivers and streams. EPA concludes that Utah properly considered the waters identified in its most recent §305(b) report as “partially supporting,” “not supporting,” and “fully supported but threatened” in development of its 2004 §303(d) waterbody list.

■ *Waters for which dilution calculations or predictive models indicate non-attainment of applicable water quality standards (§130.7(b)(5)(ii)).*

Utah assembled and evaluated information from past and anticipated dilution calculations and predictive modeling. Utah included on the 2004 §303(d) list, all waters that receive discharges from UPDES permits wherever modeling indicates that applicable water quality standards may not be met, and therefore a new or updated TMDL is necessary for that waterbody. The likelihood that these waters will need a new or updated TMDL is high, thus qualifying them to be on the §303(d) list of waters in need of new or updated TMDLs. The listing of these waters is supported primarily by the past and anticipated results of dilution calculations and predictive modeling. The waterbodies in this category are included in Table 12-5C along with the TMDL parameters of concern. Waterbodies on this section of the §303(d) list most likely do not have evidence (e.g., ambient monitoring data) of in-stream impairment, but are appropriately included on the §303(d) list because of the anticipated need for a new or updated TMDL.

EPA concludes that Utah properly considered waters for which dilution calculations or predictive models indicate nonattainment of applicable water quality standards in development of its 2004 §303(d) waterbody list.

■ *Waters for which water quality problems have been reported by local, state, or federal agencies; members of the public; or academic institutions (§130.7(b)(5)(iii)).*

The State widely solicited data and information while preparing the year 2004 §303(d) list. The State received comments on specific waterbodies that should be included on the list from organization and citizens solicited during the public participation period.

EPA concludes that Utah properly considered waters for which water quality problems have been reported by local, state, or federal agencies; members of the public; or academic institutions in development of its 2004 §303(d) waterbody list.

■ *Waters identified by the State as impaired or threatened in a nonpoint assessment submitted to EPA under section 319 of the CWA or in any updates of the assessment (§130.7(b)(5)(iv))*

The State has been involved in watershed assessment and implementation activities since the late 1970's. The State's 2004 §303(d) list includes all waters that have data to support nonpoint source pollution impairment. The State's methods of prioritizing 319 activities has changed. Utah's listing approach and methodologies direct 319 activities and resources to the highest priorities. Watershed assessments are often conducted for waterbodies that are already listed in order to collect current data to support TMDL development.

EPA concludes that Utah properly considered waters identified by the State as impaired or threatened in a nonpoint assessment submitted to EPA under section 319 of the CWA and any updates of the assessment in development of its 2004 §303(d) waterbody list.

C. Delisting of Waters

According to EPA regulations, each State must demonstrate good cause for not including a water or waters on the list. See 40 C.F.R. Part 130.7(b)(6)(iv). The State identified in Table 9-A, B and C, the waters that were taken off the 2000 list. The table includes the rationale on a waterbody-by-waterbody basis for not including the waters on the 2004 list. These reasons include:

- A waterbody listed due to error in assessment or because a waterbody was listed incorrectly in place of another waterbody or any other error not based on a water quality assessment.
- The most recent data assessment indicates that the waterbody is supporting all of its designated beneficial uses.
- A total maximum daily load analysis has been completed and approved by EPA.
- New modeling information indicates no TMDL is required in order to maintain water quality standards.
- Data assessment methodologies have been modified.

Further discussion of the various reasons for delisting waters is given in page 16, Section II. E. Criteria for Removing Waterbodies from the 303(d) List, in the State's year 2004 303(d) list submittal. For almost all the waters that were delisted, the decisions to take the waters off the list were based on new data or information, or a TMDL was completed and approved by EPA.

EPA acknowledges that states may re-evaluate the waters on their 303(d) lists. In a 1997 memorandum, EPA stated that “. . . Regions and states should keep in mind that waterbodies

may be added or subtracted over time as new lists are developed.”² Accordingly, in an August 27, 1997 memorandum, EPA identified several conditions that allow states to remove previously-listed waters from §303(d) lists. In addition to de-listing a waterbody when a TMDL has been established for it, states may delist a waterbody when:

1) the waterbody is meeting all applicable water quality standards or is expected to meet these standards in a reasonable time frame (*e.g.*, two years) as a result of implementation of required pollutant controls or

2) if, upon re-examination, the original basis for listing is determined to be inaccurate.³

Further, the existing EPA regulations require states, if requested by the Regional Administrator, to demonstrate good cause for not including waterbodies on their lists. Good cause includes, but is not limited to, more recent and accurate data, more sophisticated water quality modeling, flaws in the original analysis that led to the waterbody being listed, or changes in conditions, *e.g.*, new control equipment, or elimination of discharges. (See 40 C.F.R. 130.7(b)(6)(iv).)

In its review of the State’s year 2004 waterbody list, EPA took special care to review the methodology and resultant de-listings from Utah’s list. In its preamble to the March 31, 2000 Federal Register notice, EPA stated that:

“... EPA intends to carefully review any proposed removal of a waterbody from a §303(d) list to ensure there is information specific to the waterbody to support the removal. 65 FR 4921. In particular, where a waterbody was previously listed based on certain data or information, and the state removes the waterbody without developing or obtaining any new information, EPA will carefully evaluate the state’s reevaluation of the available information, and would not approve such removals unless the state’s submission describes in detail why it is appropriate under the current regulations to remove each affected waterbody. EPA has the authority to disapprove the list if EPA identifies existing and readily available information that was existing and readily available at the time the state submitted

² Page 4, August 8, 1997 memorandum from Robert Perciasepe, Assistant Administrator for Water, US EPA, regarding “New Policies for Establishing and Implementing TMDLs.”

³ August 27, 1997 memorandum from Robert H. Wayland III, Director, Office Wetlands, Oceans, and Watershed, Office of Water, EPA Headquarters, to Water Division Directors, Regions I - X, and Directors, Great Water Body Programs, and Water Quality Branch chiefs, Regions I - X, regarding "National Clarifying Guidance For 2000 State and Territory §303(d) Listing Decisions."

the list and that data shows that a waterbody does not attain water quality standards.” 65 FR 17168.

Table 15 identifies some waters where TMDLs have been completed for UPDES permits and are awaiting TMDL approval. EPA anticipates approving these TMDLs. Technically, these waters are still on the 2004 list until EPA takes final action. Delisting of these waterbodies from the 2004 §303(d) list is provisional until such time as EPA approves these TMDLs.

Having reviewed Utah’s submission and supporting documentation, EPA has concluded that Utah has acted reasonably and within the discretion that current EPA regulations allow in delisting waterbodies.

D. Priority Ranking

EPA also reviewed the State's priority ranking of listed waters for TMDL development, and concludes that the State properly took into account the severity of pollution and the uses to be made of such waters, as well as other relevant factors such as expiring surface water discharge permits, imminent human health problems, or local support for water quality improvement. In addition, EPA reviewed the State's identification of WQLSs targeted for TMDL development in the next two years, and concludes that the targeted waters are appropriate for TMDL development in this time frame.

The State described its prioritization criteria beginning on page 23 of its submittal. EPA believes that this criteria is reasonable because it builds on the statutory requirements regarding prioritization criteria. It also is considered reasonable because it uses supplemental criteria that is consistent with the guidance provided by EPA. The waters targeted for TMDL development in each basin, during the next two years are identified in the last column of Table 8. Many of the waters that the State has identified as high priority for TMDL development are where point source discharge permits will be renewed. However, the State has also targeted several lakes and streams where TMDL development will be more complex. Some of relevant factors the State took into account were waters with expiring point source discharge permits (includes waters where aquatic life protection is important), waters with imminent human health problems and waters with local support and readiness.

EPA has received Utah's long-term schedule for TMDL development for all waters on the State’s 2004 §303(d) list (attachment). As a policy matter, EPA has requested that states provide such schedules. See Memorandum from Robert Perciasepe, Assistant Administrator for Water, to Regional Administrators and Regional Water Division Directors, "New Policies for Developing and Implementing TMDLs", August 8, 1997. EPA is not taking any action to approve or disapprove this schedule pursuant to §303(d) .

E. References

The following list includes documents that were used directly or indirectly as a basis for EPA's review of the State's §303(d) waterbody list. This list is not meant to be an exhaustive list of all records reviewed, but to provide the primary documents the Region relied upon in making its decisions to approve the State's list.

40 CFR Part 130 Water Quality Planning and Management

40 CFR Part 131 Water Quality Standards

December 28, 1978 Federal Register Notice, *Total Maximum Daily Loads Under Clean Water Act*, finalizing EPA's identification of pollutants suitable for TMDL calculations, 43 Fed. Reg. 60662.

January 11, 1985 Federal Register Notice, *40 CFR Parts 35 and 130, Water Quality Planning and Management: Final Rule*, 50 Fed. Reg. 1774

April 1991, "Guidance for Water Quality-Based Decisions: The TMDL Process," EPA 440/4-91-001.

July 24, 1992 Federal Register Notice, *40 CFR Parts 122, 123, 130*, revision of regulation, 57 Fed. Reg. 33040

August 13, 1992 memorandum from Geoffrey Grubbs, Director, Assessment and Watershed Protection Division, Office of Water, EPA Headquarters, to EPA Water Quality Branch Chiefs, Regions I - X and TMDL Coordinators, Regions I - X, regarding "Supplemental Guidance on Section 303(d) Implementation."

October 30, 1992 memorandum from Geoffrey Grubbs, Director, Assessment and Watershed Protection Division, Office of Water, EPA Headquarters, to Water Quality Branch Chiefs, Regions I - X, regarding "Approval of 303(d) Lists, Promulgation Schedules/Procedures, Public Participation."

November 26, 1993 memorandum from Geoffrey Grubbs, Director, Assessment and Watershed Protection Division, Office of Water, EPA Headquarters, to Water Quality Branch Chiefs, Regions I - X, and TMDL Coordinators, Regions I - X, regarding "Guidance for 1994 Section 303(d) Lists."

August 27, 1997 memorandum from Robert H. Wayland III, Director, Office Wetlands, Oceans, and Watershed, Office of Water, EPA Headquarters, to Water Division Directors, Regions I - X, and Directors, Great Water Body Programs, and Water Quality Branch chiefs, Regions I - X, regarding "National Clarifying Guidance For 2000 State and Territory Section 303(d) Listing Decisions."

September, 1997 guidance from Office of Water, Headquarters, US EPA regarding Guidelines for Preparation of the Comprehensive State Water Quality Assessments (305(b) Reports) and Electronic Updates: Supplement, EPA-841-B-97-002B

April 24, 1998 draft final report from the TMDL Federal Advisory Committee to US EPA entitled TMDL Federal Advisory Committee Report prepared with assistance from Ross & Associates Environmental Consulting, Ltd.

August 23, 1999 64 Federal Register 46012 Proposed Revisions to the Water Quality Management and Planning Regulations.

April 27, 2000 65 Federal Register 24641 EPA Review and Approval of State and Tribal Water Quality Standards.

April 28, 2000 memorandum from Robert H. Wayland, III (Director, Office of Wetlands, Oceans, and Watersheds) to Water Division Directors, Regions 1 - 10 entitled "EPA Review of 2000 Section 303(d) lists."

May 20, 2004 memorandum from Charles H. Sutfin, Director, Assessment and Watershed Protection Division, US EPA to Water Quality Branch Chiefs, TMDL Coordinators, Monitoring Coordinators, and ORC TMDL Attorneys (Regions I - X) regarding "EPA Review of 2002 Section 303(d) Lists and Guidelines for Reviewing TMDLs under Existing Regulations issued in 1992"